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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

(No. 15)

THE ATLANTIC COAST LINE RAILROAD COMPANY,

PLAINTIFF IN ERROR,

versus

THE NORTH CAROLINA CORPORATION COMMISSION,

DEFENDANT IN ERROR.

BRIEF OF

ROBERT D. GILMER,

ATTORNEY-GENERAL OF NORTH CAROLINA,

AND

F. A. WOODARD,

COUNSEL FOR THE NORTH CAROLINA CORPORATION COMMISSION,

DEFENDANT IN ERROR.

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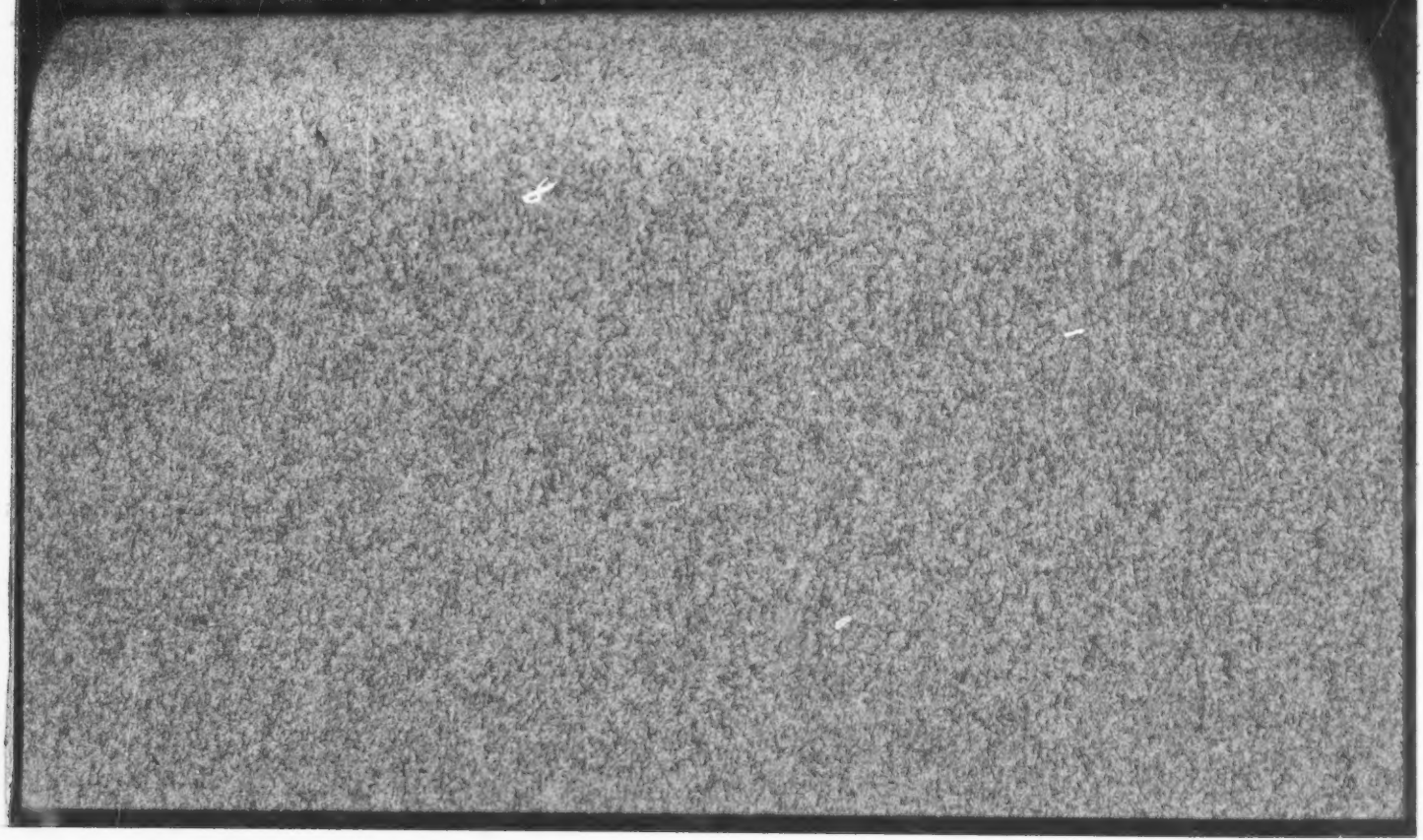

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(No. 186)

THE ATLANTIC COAST LINE RAILROAD COMPANY,

PLAINTIFF IN ERROR,

versus

THE NORTH CAROLINA CORPORATION COMMISSION,

DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

STATEMENT OF THE CASE.

It appears from the record that for some ten years prior to 11th October, 1903, the passenger traffic from a large portion of eastern North Carolina to Raleigh, and to points west thereof, was made by the plaintiff in error, the Atlantic Coast Line Railroad Company, connecting with the Southern Railway at Selma at 2:50 P. M. daily. For a year or two prior to that day the connection became very irregular, to the great inconvenience of the traveling public, passengers frequently being compelled to lie over at Selma until 11 o'clock at night and then compelled to take a mixed train, with uncomfortable accommodations, to go westward. The Southern Railway, finding its time between Goldsboro and Greensboro (thirty-eight miles per hour) dan-

gerous by reason of the condition of its track, changed its schedule, leaving Goldsboro thirty minutes earlier. The condition being called to the attention of the Corporation Commission, it undertook to remedy the evil. After much correspondence, and conference with the officials of both roads, the Commission, on December 8, 1903, made the following order:

> "Whereas, the convenience of the traveling public requires that close connection be made between the passenger trains on the Atlantic Coast Line Railroad and the Southern Railway at Selma daily, in the afternoon of each day; and whereas, it appears that such close connection is practicable: *It is ordered,* that the Atlantic Coast Line Railroad arrange its schedule so that the train will arrive at Selma at 2:25 P. M. each day, instead of 2:50 P. M., as the schedule now stands. *It is further ordered,* that if the Atlantic Coast Line trains have passengers *en route* for the Southern Railway and are delayed, notice shall be given to the Southern Railway, and that the Southern Railway shall wait fifteen minutes for such delayed trains upon receipt of such notice.
>
> "This order shall take effect 20th December, 1903.
>
> "FRANKLIN McNEILL, *Chairman.*
>
> "H. C. BROWN, *Clerk.*"

This order quickened the arrival time of the Atlantic Coast Line train at Selma twenty-five minutes, but, as it required the Southern to wait at that point fifteen minutes for delayed trains, it more than divided the time between the roads, requiring only ten minutes advance of time on the part of the plaintiff in error to secure this convenience to the traveling public. On December 18, 1903, upon the application of counsel for the plaintiff in error, the order was suspended and both companies notified to appear before the Corporation Commission at Raleigh on January 12, 1904, that "the matter of the connection at Selma of the Atlantic Coast Line going south with that of the Southern Railway going west in the afternoon" might be heard, and asking both companies to have representatives present.

The plaintiff in error appeared, by its superintendent and its general counsel; the other company was also represented. After a hearing, "the situation being thoroughly discussed," the Commission made a full finding of the facts, and made the following order:

> *"And it is therefore ordered,* that the Atlantic Coast Line Railroad Company furnish transportation for passengers from Rocky Mount to Selma after 12:50 P. M. and by and before 2:25 P. M. each day. *It is further ordered,* that the Southern Railway hold its train No. 135 at Selma fifteen minutes, if for any reason the Atlantic Coast Line train, connecting at that point, is delayed."

It was further provided that the order should take effect January 26, 1904. To this judgment the Southern Railway Company did not except. The Atlantic Coast Line filed the following exceptions:

> 1. That it was not practicable to make the connection at Selma by extending the run of either its Plymouth or its Springhope train to Selma.
> 2. That it would be unprofitable, and a loss, for it to make the connection by putting on an additional train from Rocky Mount to Selma.
> 3. The Commission has no power to require it to put on extra trains.
> 4. That it is not practicable to make the connection without putting on an extra train, which the Commission has no power to do.
> 5. That the order is unreasonable because passengers from Rocky Mount can make connection at Goldsboro at 6:50 A. M. or at Selma by night train over the Southern, or they could go up to Weldon and go over the Seaboard Railroad.

A letter in the record from the transportation department of the plaintiff in error, dated January 23, 1904, states that prior to the breaking of connection at Selma its 2:50 P. M. train transported an average of twelve passengers daily for

the Southern at Selma, while since the break in the connection the average was only two. This shows 3,650 passengers annually inconvenienced by the failure to connect at that point. There is evidence elsewhere in the record that it was a very much larger number. On February 2, 1904, the exceptions were heard by the Commission; testimony of witnesses was offered by the plaintiff in error, together with other evidence. Upon all the evidence, and after argument by counsel for the plaintiff in error, the Commission, February 13, 1904, made a fuller finding of fact, in the course of which it is recited, *inter alia,* that by the connection at Selma at 2:50 P. M. between the Atlantic Coast Line train No. 29 (southbound) and the Southern train No. 135 (westbound), "the greater portion of the section of the country reached by the said branch roads had, for years, furnished the nearest and cheapest route of travel to Raleigh and other Southern Railway points. The greater portion of the travel between the Atlantic Coast Line territory and the Southern Railway points was by this route. It is admitted in the correspondence of the Atlantic Coast Line in this matter that this was a most important connection, being the principal outlet for passengers *en route* from eastern North Carolina territory to Raleigh and other Southern Railway points. There seems to have been no complaint about the failure of these railroad companies to keep this schedule, and make this connection, until about the year 1900. The Atlantic Coast Line informs the Commission that 'this matter has been a frequent source of correspondence between this company and the Southern Railway Company since 1900, and that during this time frequent complaints have been made to this company by the Southern Railway Company of its failure to make schedule time at Selma.' "

The Commission further found, giving reasons therefor, that passengers ought neither to be required to go a much longer distance around by Weldon nor to make connection at unreasonable hours at Goldsboro (6:50 A. M.), nor take a night train (11 P. M.) connection at Selma, when a few minutes quickened time would maintain the connection which has been made at Selma in the early afternoon for more than ten years. The Commission also found that the plaintiff in error could make the connection, if it chose, by extending the run of its Springhope train, which, coming down nineteen miles from that place, reached Rocky Mount at 12:10, where it lay over until 4 P. M. before returning to Springhope, during which four hours it could easily be run forty-one miles and back, making this connection. And the Commission further found that the connection could be made by the extension of the Plymouth train, which is scheduled to leave Plymouth for Rocky Mount, a distance of seventy miles, at 7:30 A. M., reaching Rocky Mount at 10:30, where it lays over until 4 P. M. before returning to Plymouth. During which five and one-half hours it could easily make the trip to Selma and return and make the connection.

The conductor, engineer and train crew of the Plymouth train are not employed during this five and one-half hours.

It thus concludes:

> "There is, within the territory served by these branch lines, approximately 400,000 inhabitants. The report of the Atlantic Coast Line Company to this Commission for the fiscal year ending June 30, 1903, shows net earnings from operation in North Carolina amounting to $1,943,116.63; and that there was a surplus of $1,293,983.54 after paying interest on its debts and five per cent. dividends on its stock, both common and preferred, from the net earnings of the company's entire line. On a mileage basis this will show that there was a surplus of net earnings in North Carolina for that year of approximately $324,493.

"The Commission is of the opinion that the facilities given heretofore by the Atlantic Coast Line to the traveling public should not be lessened; that the connection furnished passengers from the Washington branch and Norfolk and Carolina branch, the Plymouth branch, and the Nashville branch, with No. 135 Southern Railway passenger train at Selma, and also for all points between Rocky Mount and Selma, for nearly ten years, should be restored; that if this cannot be done by the Atlantic Coast Line train No. 39, as formerly, on account of this train being heavier, containing usually one or more express cars, and in all usually ten or more cars, and on account of increase in business between Richmond and Selma, which necessitates longer stops, then other facilities should be furnished by the Atlantic Coast Line Company; that this connection, which was the principal outlet for passengers from eastern Carolina to Selma and other Southern Railway points for the last ten years, instead of being abandoned, should be made permanent and certain, and that this result be accomplished by carrying out the order heretofore made in this Court. *It is ordered,* therefore, that the exceptions be and are hereby overruled.

"FRANKLIN McNEILL, *Chairman.*"

From this order, thus repeated the third time, and after the fullest investigation, occupying several months, the plaintiff in error appealed to the Superior Court. In that Court the following issues were submitted, the Corporation Commission excepting:

"1. Is it practicable for train No. 39 of the Atlantic Coast Line, due to arrive at Selma at 2:50 P. M., to make connection at Selma with train No. 135, westbound, of the Southern Railway, due to leave Selma at 2:25 P. M.?

"2. Is it practicable to make said connection by extending the run of the Plymouth train daily from Plymouth to Selma and return, and if so, what would be the additional expense?

"3. Is it practicable to make said connection by the use of the Springhope train, and if so, what would be the additional expense?

"4. In order to make such connection, would the defendant company have to run an additional train on its main line from Rocky Mount to Selma?"

The Court directed the jury to answer the first three issues "No" and the fourth issue "Yes," and the Corporation Commission excepted. The following issues the jury were permitted to answer, to which they responded as follows:

"5. Is it practicable for said train to run the schedule prescribed in the plaintiff's order, having due regard to the number of trains and number of stops on the defendant's main line from Rocky Mount to Selma? 'Yes.'

"6. What would be the daily cost of operating such train from Rocky Mount to Selma and return? 'Forty dollars.'

"7. What would be the probable daily receipts from such train? 'Twenty-five dollars.'

"8. Is it reasonable and proper that for the convenience of the traveling public the defendant company should be required to make such connection? 'Yes.'"

Upon the verdict the Court rendered the judgment set out in the record, p. 86. The defendant in error excepted to this judgment and appeal to the Supreme Court. The Supreme Court reversed said judgment and rendered the following judgment (record, p. 278):

"This cause came on to be heard on the transcript of the record from the Superior Court of Wake County, upon consideration whereof this Court is of opinion that there is error in the ruling of the said Superior Court, and it is therefore considered and adjudged by the Court here that the judgment of said Superior Court be reversed, and that the order of the Corporation Commission of February 13, 1904, requiring defendant, the Atlantic Coast Line Railroad Company, to furnish transportation to passengers from Rocky Mount to Selma after 12:50 P. M. and by or before 2:25 P. M. each day, and that the Southern Railway Company hold its train No. 135 at Selma fifteen minutes, if for any reason the Atlantic

> Coast Line train, connecting at that point, is delayed, is in all respects valid and is hereby affirmed. And it is further ordered and adjudged that a *cessat executio* till February 10, 1905, be entered on the judgment docket of this Court, and until that date no mandate shall issue to the defendant upon this judgment."

For the decision in the said case, see 137 N. C. Report, p. 1.

FAILURE OF ATLANTIC COAST LINE TRAIN No. 39 TO MAINTAIN SCHEDULE TIME BREAKS SELMA CONNECTION.

Mr. Borden, the general superintendent of transportation of the Coast Line Company, in a communication to the North Carolina Corporation Commission, dated December 14, 1903, transmitted copies of daily train reports showing the time of the arrival of train No. 39 at Selma from August 1, 1903, to December 10, 1903. These reports disclose an average daily delay of this train in arriving at Selma of thirty-four minutes.

Mr. Borden says (record, p. 19):

> "We have not been able to maintain the present arriving time at Selma, due to our northern connections delivering train late, and increase of our own business along the line, which necessarily consumes more time at various stops."

On this point we quote the following from the testimony of Mr. Borden (record, pp. 181, 182):

> *Q.* "Now, I will ask you this: If, as a matter of fact, prior to the Southern moving up twenty-five minutes, if that connection at Selma was not a very uncertain one on the part of the Coast Line?"
>
> *A.* "I would say yes."
>
> *Q.* "The failure of people from eastern Carolina to get to Selma prior to October was due to the failure of the Coast Line's No. 39 to reach Selma on time?"
>
> *A.* "Yes."
>
> *Q.* "If your 39 arrived at Selma on time, you would make connection every day?"
>
> *A.* "Yes."

Q. "And the failure to connect at Selma was due to the failure of your train to reach Selma at 2:50; for instance, on the 29th of January, 39, this train, arrived at Selma 3:45?"

A. "Yes."

Q. "It arrived on the 30th at 5?"

A. "Yes; that is taken from the record."

It thus appears that the convenient and long-established connection at Selma was broken by the Coast Line Company. The North Carolina Corporation Commission so found. The following is taken from its order of January 26, 1904 (record, p. 29):

> "For the past year, although announced in the schedule of these railroad companies, the connection has not been kept. The reason for this failure was the fact that the Atlantic Coast Line train did not make the schedule time. The record of train sheets of the Atlantic Coast Line Railroad Company shows that No. 39 only arrived at Selma on schedule time twice between August 1, 1903, and January 11, 1904, and that during this period No. 39 was more than ten minutes late every day except twenty-four."

So that, during this period passengers of the plaintiff in error going to points west of Selma were required to remain at Selma until 10:40 P. M. in a waiting-room insufficiently lighted and heated, and in order to continue their journey were compelled to take a mixed train, running on a slow schedule, for Raleigh and points west thereof.

SELMA, THE PRINCIPAL OUTLET FOR PASSENGER TRAFFIC FROM EASTERN NORTH CAROLINA TO RALEIGH AND POINTS WEST.

The following appears in the testimony of Mr. Borden (record, p. 180):

Q. "The route for Raleigh and points west for the people in eastern Carolina was *via* Selma?"

A. "Yes, it was the most direct route."

Q. "It was the most important connection for the people of eastern Carolina?"

A. "It was a very convenient connection."

Q. "It was the principal outlet for passengers from eastern Carolina to Raleigh and other points on the Southern?"

A. "Yes."

On the trial of this cause in the Superior Court of Wake County the eighth issue—"Is it reasonable and proper that, for the convenience of the traveling public, the defendant company (the plaintiff in error here) should be required to make such connection?"—was answered "Yes."

In the order made by the North Carolina Corporation Commission on February 13, 1904, the following appears (record, pp. 81, 82):

> "The Commission is of the opinion that the facilities given heretofore by the Atlantic Coast Line Company to the traveling public should not be lessened; that the connection furnished passengers from the Washington branch, the Norfolk and Carolina branch, the Plymouth branch and the Nashville branch with No. 135 Southern Railway passenger train at Selma, and also for all points between Rocky Mount and Selma, for nearly ten years, should be restored; that if this cannot be done by the Atlantic Coast Line train No. 39, as formerly, on account of this train being heavier, containing usually one or more extra express cars, and in all usually ten or more cars, and on account of increase in business between Richmond and Selma, which necessitates longer stops, then other facilities should be furnished by the Atlantic Coast Line Company; that this connection, *which was the principal outlet for passengers from eastern Carolina to Selma and other Southern Railway points for the last ten years,* instead of being abandoned, should be made permanent and certain, and that this result be accomplished by carrying out the order heretofore made in this Court."

ARGUMENT.

Counsel for the plaintiff in error insisted in their argument before the Supreme Court of North Carolina, and the assignments of error here present practically the same objections, to the order of the Corporation Commission.

1. THAT THE CORPORATION COMMISSION HAD NO POWER OR AUTHORITY TO MAKE THE ORDER REQUIRING THE CONNECTION TO BE MADE.
2. THAT THE ORDER IS A VIOLATION OF THE CONSTITUTION OF THE UNITED STATES AND OF NORTH CAROLINA.
3. THAT THE ORDER IS UNREASONABLE AND UNJUST.

The answer to the first objection is that the Supreme Court of North Carolina has held that the power to make the order in question was conferred upon the Corporation Commission by the statute creating it. It has been uniformly held that the construction of a State statute by the Supreme Court of a State will be followed by the Supreme Court of the United States.

The third contention, that the order is unjust and unreasonable, was settled by the finding of the jury, who, in response to the eighth issue—"Is it reasonable and proper that, for the convenience of the traveling public, that the company should make such connection?"—answered said issue in the affirmative.

The Commission having the power to make the order, the jury having found that the order was reasonable and just, and this finding and conclusion having been approved by the Supreme Court of North Carolina, it is respectfully submitted that this question is not reviewable here.

THE RECORD DOES NOT PRESENT A FEDERAL QUESTION.

The plaintiff in error seeks to raise the Federal question by the suggestion that the enforcement of the order of the North Carolina Corporation Commission "would deprive it of its property without compensation and without due process of law." The assignments of error (record, pp. 4, 5, 6, 7), involving the constitutional question, are based upon the theory that the order of the Corporation Commission *requires* the plaintiff in error to operate an extra train between Rocky Mount and Selma; and that, as the cost of operating such train would exceed the probable receipts by fifteen dollars per day, the judgment affirming the order of the Corporation Commission is void, because such order deprives plaintiff in error of its property without compensation and without due process of law, and therein violates the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of North Carolina, referring to the order of the Commission, said (*Railroad Connection Case,* 137 N. C., 1, 22):

> "That order simply directed the defendant to make the connection daily at Selma at the time mentioned therein, without specifying whether this should be done by quickening the speed of train No. 39 or by extending the run of the Springhope or the Plymouth train, or by putting on an extra train from Rocky Mount to Selma, and our judgment leaves to the defendant the same liberty of choice as to the mode in which it shall put into effect the order of the Commission."

The Supreme Court of North Carolina further said (*Railroad Connection Case, supra,* p. 20):

> "On the third issue, as to the practicability of running the Springhope train to Selma in the four hours

> that it lies over at Rocky Mount, the evidence was uncontradicted that this could be done, and there was even evidence from two reputable witnesses which proved (if believed by the jury) that the costs of the extra run would be only ten dollars, showing a profit of fifteen dollars daily. * * * It follows that it was error to instruct the jury, in response to the fourth issue, to find that the connection could only be made by an additional train from Rocky Mount to Selma."

And so, when the Court held, upon the evidence and verdict, that the order of the Commission requiring the plaintiff in error to make the connection was a reasonable order (the convenience of the traveling public requiring it to be made), this Court will not reverse said judgment and hold that the order was unreasonable and therefore void, unless it is made clearly to appear that the performance of the order would entail such loss upon the plaintiff in error as would prevent it from paying its operating expenses, interest on its indebtedness and a reasonable dividend to its stockholders; and it is incumbent upon the plaintiff in error to conclusively establish that such will be the effect of the order. Upon an examination of the testimony of the witnesses for the plaintiff in error, the cost of making the connection by the use of the Springhope or Plymouth train would not exceed or equal the revenue to be derived from its operation. Indeed, it is not insisted that the order of the Commission would produce any such results.

As decided by the Supreme Court of North Carolina, it would not be necessary for the plaintiff in error to operate an extra train between Rocky Mount and Selma, and the alleged loss of fifteen dollars per day which the plaintiff in error contends is a taking of its property without due process of law would be avoided. Thus considered, it is submitted that the case does not present a Federal question.

The only appellate jurisdiction conferred by Congress upon this Court to review the judgments or decrees at law or in equity of the highest Court of a State is by writ of error, and on writ of error nothing is removed for re-examination but questions of law arising upon the record. The findings of fact made in the Supreme Court of the State will be the basis of the decision of this Court.

Quimby v. Boyd, 128 U. S., 488, 489.
Dower v. Richards, 151 U. S., 658.
Baldwin v. Kansas, 129 U. S., 52.
Egan v. Hart, 165 U. S., 188.
Thayer v. Spratt, 189 U. S., 346.
Adams v. Church, 193 U. S., 510.
Clipper Mining Co. v. Eli Mining and Land Co., 194 U. S., 220.
Smiley v. Kansas, 196 U. S., 447; 49 Law Ed., 546, and cases cited in the note.
Chrisman v. Miller, 197 U. S., 313.
Noble v. Mitchell, 164 U. S., 367.
Turner v. New York, 168 U. S., 90, 95.

In *Clipper Mining Co. v. Eli Mining and Land Co., supra,* at p. 222, Mr. Justice Brewer said:

> "It is the settled rule that this Court, in an action at law at least, has no jurisdiction to review the conclusion of the highest Court of the State upon questions of fact."

In *Adams v. Church, supra,* Mr. Justice Day, at p. 513, said:

> "The finding of facts made in the Supreme Court of Oregon is binding upon this Court and will be the basis of the decision here."

In *Smiley v. Kansas, supra,* it was held:

> "This Court will not inquire whether the finding of the jury in the State Court is against the evidence; it will take the facts as found and consider only

whether the State statute involved is violative of the Federal Constitution.

"The power in the State Court to determine the meaning of a State statute carried with it the power to prescribe its extent and limitations as well as the method by which they shall be determined."

In *Chrisman v. Miller, supra,* it is said:

"This Court does not review questions of fact in cases coming from a State Court, but accepts the conclusions of the State tribunal as final."

In *Minn. & St. Louis R. R. Co. v. Minnesota,* 193 U. S., 53, the Supreme Court of the State of Minnesota, in reviewing an order of the Railroad and Warehouse Commission requiring a railroad company to erect a station at a certain point on its line, found that the erection of the station in question "was necessary for the accommodation of the public transacting business with the company at that point." In this Court it was insisted by the railroad company that the order was unreasonable and deprived it of its property without due process of law. This Court, however, upheld the statute of the State of Minnesota as construed by the Supreme Court of the State, to the effect that the Commission had power to make the order in question; and further, that the finding of fact by the highest Court of the State that the station was necessary for the convenience of the public was not open to review here, but was "like the verdict of a jury, conclusive in this Court." And it was expressly held that the record did not present a Federal question.

The plaintiff in error, in its assignments of error, attacks the order of the Commission as unreasonable upon the suggestion that the order was made for the sole convenience of the passengers of the Southern Railway. This contention cannot be maintained. The order was made to promote the comfort and

convenience of the traveling public. Every witness who testified to the discomfort, expense and inconvenience to which passengers were subjected by the failure of the Coast Line to maintain its schedule and thereby make the connection at Selma related to a passenger of the plaintiff in error who, in order to reach Selma, had traveled over its system. It is submitted that the duty of the Atlantic Coast Line Railroad Company as a common carrier is not discharged simply by transporting a passenger to a point at which its line connects with the line of another railroad, but it is under obligation to transport its passengers over its line of railroad in such way and at such time as to enable them to make convenient connection to their points of destination.

In *Chicago, etc., Railway Co. v. Minnesota,* 134 U. S., at p. 461, Mr. Justice Bradley said:

> "When a railroad company is chartered it is for the purpose of performing a duty which belongs to the State itself. It is chartered as an agent of the State for furnishing public accommodation. The State might build its railroads if it saw fit. It is its duty and its prerogative to provide means of intercommunication between one part of its territory and another."

In *Lake Shore & Michigan Southern Railway v. Ohio,* 173 U. S., 285, 302, Mr. Justice Harlan, speaking for the Court, said:

> "The plaintiff in error accepted its charter subject necessarily to the condition that it would conform to such reasonable regulations as the State might from time to time establish that were not in violation of the supreme law of the land. In the absence of legislation by Congress, it would be going very far to hold that such an enactment as the one before us was in itself a regulation of interstate commerce. It was for the State to take into consideration all the circumstances affecting passenger travel within its limits, and as far

as practicable make such regulations as were just to all who might pass over the road in question. It was entitled, of course, to provide for the convenience of persons desiring to travel from one point to another in the State on domestic trains."

THE SCOPE OF THE DECISION OF THE SUPREME COURT OF NORTH CAROLINA.

The Supreme Court of North Carolina decided:

1. THAT THE CONNECTION AT SELMA BY THE PLAINTIFF IN ERROR IS REASONABLE AND PROPER FOR THE CONVENIENCE OF THE TRAVELING PUBLIC, AS FOUND BY THE TRIAL JURY.

2. THAT THE ORDER OF THE COMMISSION IN EFFECTING THIS CONNECTION DOES NOT REQUIRE THE PLAINTIFF IN ERROR TO OPERATE AN EXTRA TRAIN, BUT THAT THE CONNECTION MAY BE EFFECTED BY THE EXTENSION OF EITHER THE SPRINGHOPE OR THE PLYMOUTH RUN.

3. THAT THE CORPORATION COMMISSION OF THE STATE HAS POWER TO REQUIRE A RAILROAD COMPANY TO HAVE A TRAIN ARRIVE AT A CERTAIN STATION ON ITS ROAD AT A CERTAIN SCHEDULE TIME, SO AS TO CONNECT WITH THE TRAIN OF ANOTHER COMPANY.

The North Carolina Corporation Commission found as a fact that its order could be carried into effect by the extension of either the Springhope or the Plymouth run, and this finding was affirmed by the Supreme Court of North Carolina.

The highest Court of the State having therefore decided against the plaintiff in error upon an independent ground, not involving a Federal question, and broad enough to maintain the

judgment, it is submitted that the judgment of the Supreme Court of North Carolina should be affirmed or the writ of error dismissed without considering the Federal question, assuming that one is presented in the record.

Kennebec & P. R. Co. v. Portland & R. R. Co., 14 Wall., 23.
Hammond v. Johnson, 142 U. S., 73.
Northern P. R. Co. v. Ellis, 144 U. S., 458.
Delaware City, etc., v. Reybold, 142 U. S., 636.
Walter A. Wood Mowing & Reaping Mch. Co. v. Skinner, 139 U. S., 293.
Henderson Bridge Co. v. Henderson, 141 U. S., 679.
Missouri P. R. Co. v. Fitzgerald, 160 U. S., 556.
California Powder Works v. Davis, 151 U. S., 389, 393.
Murdock v. Memphis, 20 Wall., 590.
McLaughlin v. Fowler, 154 U. S., 663.

In *Murdock v. Memphis, supra*, this Court announced, among other conclusions, the following:

> "4. If it (the issue raised by the question of Federal law) was erroneously decided, then the Court must further inquire whether there is any other matter or issue adjudged by the State Court sufficiently broad to maintain the judgment, notwithstanding the error in the decision of the Federal question. If this be found to be the case, the judgment must be affirmed without examination into the soundness of the decision of such other matter or issue.
>
> "5. But if it be found that the issue raised by the question of Federal law must control the whole case, or that there has been no decision by the State Court of any other matter which is sufficient of itself to maintain the judgment, then this Court will reverse that judgment, and will either render such judgment here as the State Court should have rendered, or will remand the case to that Court for further proceedings, as the circumstances of the case may require."

To the same effect is *McLaughlin v. Fowler, supra,* where it is held that—

> "In cases brought to the Supreme Court from a State Court, the former can only look beyond the Federal question when that has been decided erroneously, and then only to see whether there are any other matters or issues adjudged by the State Court sufficiently broad to maintain the judgment, notwithstanding the error in the decision of the Federal question."

In this connection we desire to advert to the order of the North Carolina Corporation Commission, which is the basis of this litigation. It is as follows (record, p. 30):

> *"It is therefore ordered, that the Atlantic Coast Line Railroad Company furnish transportation for passengers from Rocky Mount to Selma after 12:50 P. M. and by or before 2:25 P. M. each day.*
>
> *"It is further ordered, that the Southern Railway hold its train No. 135 at Selma fifteen minutes, if for any reason the Atlantic Coast Line train connecting at that point is delayed."*

We stress the point that this order does not require the plaintiff in error to operate an extra train between the points named therein. It will be noted that when the trial jury found that a compliance with the order of the Commission would entail a probable loss of fifteen dollars per day to the plaintiff in error, the finding related exclusively to the extra train and not to the extension of either the Springhope or the Plymouth run. There is nothing in the record which establishes the contention that to carry into effect the order of the Commission by either one of the latter methods would not be compensatory.

If, then, the Corporation Commission had the power to make the order (and the Supreme Court of North Carolina expressly so held), and it is reasonable and proper for the convenience of the traveling public for the plaintiff in error to carry into effect

the order (and the trial jury expressly so found), and the alleged *probable* loss of fifteen dollars per day obtains only in the event that an extra train is operated, and does not obtain in the event of an extension of either the Springhope or Plymouth run, wherein, we ask, does the order do violence to the Fourteenth Amendment by depriving the plaintiff in error of its property without compensation and without due process of law?

The jury having found that the convenience of the traveling public required the plaintiff in error to make the connection at Selma, the Supreme Court of North Carolina having held that the Corporation Commission had the power under the statute to require the plaintiff in error to make the connection, and that it was practicable for the connection to be made by three methods, it was incumbent upon the plaintiff to show that upon the adoption of any one of the three methods suggested by the Court a loss would be sustained by it before it could invoke the principle relied on. Two of the methods suggested, as have been fully demonstrated, were entirely practicable—did not require any additional equipment. If either of these methods were adopted by the plaintiff in error, the connection could have been made without any loss. It does not appear to this Court which of these methods the plaintiff in error has adopted in order to perform the order of the Corporation Commission. For aught it appears in the record, the plaintiff in error may have utilized either the Plymouth train or the Springhope train in making the connection. Certainly the presumption is that the plaintiff in error, having due regard to its own interest, has adopted the least expensive practicable method.

The order of the Commission went into effect February 10, 1905. Under the laws of North Carolina, the plaintiff in error is required to submit to the North Carolina Corporation Com-

mission statements of the receipts and expenditures in the operation of its trains. We submit that, inasmuch as the Corporation Commission has found as a fact that its order can be carried into effect in any one of the three different methods hereinbefore suggested, which order was affirmed by the Supreme Court of North Carolina, did not the duty devolve upon the plaintiff in error to undertake in good faith to carry into effect the order of the Commission? And if by experimental operation it had been ascertained that the order of the Commission could not in any of the three ways be made effective without loss to the company, to have applied to the Commission for an annulment or modification of its order, or an increase in the compensation of its passenger rates, and, in the event of its refusal to grant relief, to have invoked, then, the aid of this Court. Then the Court could have passed upon the question in the light of the actual, rather than the probable, result of a compliance with the order of the Corporation Commission.

It is well settled that the presumption of law is always in favor of the maintenance of the order of a railroad commission, and the same will not be set aside unless flagrantly in violation of the rights of the railroad company.

Dow v. Beidleman, 125 U. S., 680.
Reagan v. Trust Co., 154 U. S., 362, 395.
Railroad v. Tompkins, 176 U. S., 167, 173.
Brannon on the Fourteenth Amend., p. 197.

We desire now to submit the view that if the Court should be of the opinion that a Federal question is presented in the record there has been no decision thereon by the Supreme Court of North Carolina of which the plaintiff in error can complain.

THE ORDER OF THE CORPORATION COMMISSION DOES NOT DEPRIVE PLAINTIFF IN ERROR OF ITS PROPERTY UNDER THE "DUE PROCESS OF LAW" CLAUSE OF THE FEDERAL CONSTITUTION.

There is no deprivation of property without due process of law involved in the order of the Commission, but only the legitimate *regulation* of property affected with a public use for public convenience. It may be observed here that this Court said, in *Fallbrook Irrigation District v. Bradley*, 164 U. S., 112, 158:

> "There is no specific prohibition in the Federal Constitution which acts upon the States in regard to their taking private property for any but a public use. The Fifth Amendment, which provides, among other things, that such property shall not be taken for public use without just compensation, applies only to the Federal Government, as has been many times decided. In the Fourteenth Amendment the provision regarding the taking of private property is omitted, and the prohibition against the State is confined to its depriving any person of life, liberty or property without due process of law."

There is a clear distinction between taking or an appropriation of property for public use and regulating the use of property devoted to a use in which the public has an interest. In the former case the State compels the dedication of the property, or some interest therein, to a public use, or, if already dedicated to one public use, then to another. In the latter case the owner has voluntarily, or in return for rights conferred by charter, dedicated the property to a use in which the public has an interest, and the use of that property so dedicated is merely regulated for the public welfare. The order of the North Carolina Corporation Commission complained of does not compel the plaintiff in error to dedicate its property to the public use or to a different use from that to which it has already been

dedicated. In consideration of rights bestowed upon it by the State in its charter, it has voluntarily undertaken to operate its road in North Carolina subject to reasonable regulations designed to promote the general welfare and convenience of the traveling public, made by the Legislature or by a body to whom this power has been specially delegated.

The public safety, interest and convenience are clearly embraced within the legislative power of the State, and the exercise of this power does not deprive the plaintiff in error of its property without due process of law under the Constitution of North Carolina or of the United States.

Brass v. North Dakota, 153 U. S., 391.
Budd v. New York, 143 U. S., 517.
Munn v. Illinois, 94 U. S., 113.
Jacobson v. Railroad Co., 71 Minn., 519.
Smyth v. Ames, 169 U. S., 466.
Lake Shore, etc., Railway Co. v. Smith, 173 U. S., 684.
Gladson v. Minn., 166 U. S., 427.
Railroad Co. v. Gibbes, 142 U. S., 386.
Wisconsin, etc., Railroad Co. v. Jacobson, 179 U. S., 287.
Minn. & St. Louis R. R. Co. v. Minn., 193 U. S., 53.
Railroad v. Railroad Commission of La., 109 La., 247.

In *Munn v. Illinois, supra*, this Court held that—

> "When the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public, for the common good, as long as he maintains the use."

This Court, speaking through Mr. Justice Peckham in *Wisconsin, etc., Railroad Co. v. Jacobson, supra*, at p. 296, said:

> "Railroads have from the very outset been regarded as public highways, and the right and the duty of the government to regulate in a reasonable and proper

> manner the conduct and business of railroad corporations have been founded upon that fact. Constituting public highways of a most important character, the function of proper regulation by the government springs from the fact that in relation to all highways the duty of regulation is governmental in its nature. At the present day there is no denial of these propositions. * * * The companies hold a public franchise, and governmental supervision is therefore valid. They are organized for the public interests and to subserve primarily the public good and convenience."

In *Gladson v. Minn., supra,* at p. 430, this Court declared that—

> "The State which created the corporation may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. It may prescribe the location and plan of construction of the road, the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management in order to secure the objects of the incorporation, and the safety, good order, convenience and comfort of the passengers and of the public."

The books contain almost countless cases in which the power of the Legislature to provide reasonable rules and regulations, directly or through a commission, to control common carriers, has been upheld. And it has been universally declared that these rules and regulations are not limited to matters affecting the public safety or the public health, but that they extend also to matters concerning public comfort and public convenience.

AN ORDER OF A STATE RAILROAD COMMISSION A JUDICIAL QUESTION FOR THE COURTS OF THE UNITED STATES—WHEN?

This question has been answered by this Court in *Chicago, etc., Railway Co. v. Wellman,* 143 U. S., 339, 344, with reference to rates, as follows:

> "The Legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates. *Stone v. Farmers Loan & Trust Co.*, 116 U. S., 307; *Chicago, Milwaukee, etc., Railway v. Minnesota*, 134 U. S., 418."

It is submitted that the Courts of the United States will not treat as a judicial question a law of a State Legislature or an order of a body created by it, requiring a railroad company to perform a certain service necessary for the convenience of the public and connected with its duty as a common carrier, unless the order is so unreasonable as to practically destroy the value of the property of the company. And unless this is so, this Court cannot declare that such an order is in conflict with the Constitution of the United States as depriving the company of its property without due process of law.

This Court declared, in *St. Louis, etc., Railway Co. v. Gill*, 156 U. S., 649, that—

> "When a State Legislature establishes a tariff of railroad rates so unreasonable as to practically destroy the value of the property of companies engaged in the carrying business, Courts of the United States may treat it as a judicial question and hold such legislation to be in conflict with the Constitution of the United States as depriving the company of its property without due process of law and as depriving it of the equal protection of the laws."

In the *Gill case* just cited it was adjudged by this Court that whether a tariff of rates is or is not a reasonable one is to be ascertained by its effect upon the entire line of the road, and not merely a part of it, the Court unanimously holding that the effect of a tariff of rates upon a part of a road cannot be considered as unreasonable in any case if the entire line within the State can, under the tariff, earn remunerative freights and fares. The following paragraph is taken from the opinion in *St. Louis, etc., Railway Co. v. Gill, supra*, at p. 665:

"It therefore appears that the allegations made in the evidence did not cover the company's railroad as an entirety even in the State of Arkansas, but were made in reference to that portion of the road originally belonging to the St. Louis, Arkansas and Texas Railway, and extending from the northern boundary of Arkansas to Fayetteville in said State. In this state of facts we agree with the views of the Supreme Court of Arkansas, as disclosed in the opinion contained in the record and which were to the effect that the correct test was as to the effect of the act on the defendant's entire line, and not upon that part which was formerly a part of one of the consolidating roads; that the company cannot claim the right to earn a net profit from every mile, section or other part into which the road might be divided, nor attack as unjust a regulation which fixed a rate at which some such part would be unremunerative; that it would be practically impossible to ascertain in what proportion the several parts should share with others in the expenses and receipts in which they participated; and, finally, that to the extent that the question of injustice is to be determined by the effect of the act upon the earnings of the company, the earnings of the entire line must be estimated as against all its legitimate expenses under the operation of the act within the limits of the State of Arkansas."

In *St. John v. Erie Railway Co.*, 22 Wall., 136, 149, this Court said:

"We are aware of no legal principle which would authorize the stockholders in question to analyze the business, select out a part of it, and to say that the *net earnings* [italics in opinion] specified must be a predicate of that part and of none other. * * *

"The business of the road was a unit. If it had been disintegrated as proposed by the complainant, we apprehend it would have been found that the correlations of the main stem and the branches were such and that the expenses and charges incident to the entire business and those of the several parts were so interwoven and blended that an accurate ascertainment of the net profit of the main line, and any of the auxiliaries taken separately from the rest, would have been impracticable."

Railroad Co. v. Dey (C. C.), 35 Fed., 866.
Railroad v. Minn., 186 U. S., 261.

The doctrine that if a railroad as an entirety does a business which is compensatory it has no legal right to complain that an order of a railroad commission may deprive it of revenue over a portion of its line has been affirmed by the highest Courts of several States. Among these cases the following are noted:

Railway Co. v. Smith, 60 Ark., 221.
In the matter of Auburn & W. R. Co., 37 App. Div., 162; 55 N. Y. Supp., 895.
Morgan's La. & T. R. & S. S. Co. v. Railroad Commission, 109 La., 247.
Pensacola, etc., R. R. Co. v. State of Fla., 25 Fla., 310.
The People v. St. L., A. & T. H. R. R. Co., 176 Ill., 512.
Union Traction Co. v. City of Chicago, 199 Ill., 579.

In *Railway Co. v. Smith, supra*, the Supreme Court of Arkansas held that—

> "An allegation that a passenger rate fixed by the Legislature is unreasonable in that the actual cost and expenses of transporting each passenger and his baggage over defendant's road are more than three cents a mile, and that by reason thereof defendant is compelled to transport passengers at a loss, is insufficient, on demurrer, in failing to show that the rate fixed by the act will not yield a profit upon defendant's aggregate passenger and freight business."

Said the New York Court in the matter of *Auburn & W. R. Co., supra:*

> "It thus seems to be settled by authority that where a State, either by statute or through the order of railroad commissioners, requires a railroad to establish a station at a particular place on the line of its road, such statute or order is not to be overthrown by the Courts as unreasonable merely because the establishment or maintenance of such station would prove unremunerative, and regard is to be had to the financial ability of the railroad, in view of its entire business,

to establish and maintain such station; that a statute or order of railroad commissioners establishing a station or fixing rates of transportation is not to be interfered with except upon clear and satisfactory evidence showing that it is unjust and unreasonable."

In *Morgan's La. & T. R. & S. S. Co. v. Railroad Commission, supra,* the Supreme Court of Louisiana, in defining the powers possessed by the Railroad Commission, said:

"They extend to matters concerning public comfort and convenience, and in the consideration of matters of comfort and convenience the number of persons who may be concerned or interested in some particular matter at some particular point enter as important factors in determining what is to be done. The Commission cannot ignore the comfort and convenience of numbers of citizens on a line of travel or conveyance, to base their action exclusively upon a consideration of the amount of dollars and cents which may be involved. * * * In the present instance it cannot be claimed that the Southern Pacific road, either in the operation of its line as a whole or that part of it which falls within the limits of Louisiana, has not been and is not remunerative. * * * We do not think the point is made that after the business of the railroad corporation had made it fairly remunerative the Commission is without general authority to direct that a portion of the 'surplus' profits (if that expression can be used) should be applied to the promotion of the comfort and convenience of the people along the line of the road. When such a point in the business of the road is reached, the rights of the 'general public' come clearly into view."

The Supreme Court of Florida held, in *Pensacola, etc., R. R. Co. v. State of Fla., supra,* that—

"The Courts will not interfere or grant any relief to a railroad company upon a complaint made as to one or several rates only, or where the freight and passenger rates established by the commissioners are not assailed as an entirety."

The Supreme Court of Illinois held, in *The People v. St. L., A. & T. H. R. R. Co., supra,* that—

> "The sufficiency of the earnings of a railroad to justify the expense of running a separate passenger train over a certain branch line constituting part of the entire system is not to be determined by considering the profits of that branch alone, but of the whole business of the various parts of the road operated with the branch as one continuous line."

The same Court, in *Union Traction Co. v. City of Chicago, supra,* affirmed the ruling in *The People v. St. L., A. & T. H. R. R. Co.,* and held that, in considering the reasonableness of a rate for street-car service, it was necessary to consider the profits and earnings of the whole system of street railways. The following paragraph is taken from the opinion (p. 647):

> "But if, as this opinion holds, the Chicago Consolidated Traction Company is merely a part of the Chicago Union Traction Company, and owned and operated by the latter company, then it was necessary to show the profits and earnings of the whole system of railways embraced within the Chicago Union Traction Company, and the effect of the enforcement of the ordinance upon all the lines embraced within the whole system. Evidence of the earnings or expenses of a single mile or division of a system of railways is inadmissible to prove that a rate fixed by legislation is unreasonable."

The plaintiff in error should not be permitted, under the circumstances of this case as disclosed in the record, to contend that the order of the Commission is unreasonable, and that, under it, it has been deprived of its property without compensation and without due process of law, for the reason that, as admitted by one of its high officials, it broke the convenient and long-established connection at Selma in order to increase its own revenues, and at the expense of the convenience of the peo-

ple living along its line of railway and whom it was bound primarily to serve. This circumstance will be considered in connection with the question of determining the reasonableness of the order of the Commission. Let us take the case of rate tariff. Suppose a railroad company, for its own benefit and by its own conduct, should increase the costs of service beyond that which, in the absence of such conduct, would be the actual cost, can it be heard to say that the rate established is unreasonable because less than the cost of service? For instance, cannot extravagant and unreasonable salaries paid to officials be considered in determining the cost of service, as the same affects the reasonableness or unreasonableness of the rate? This question has been answered by this Court in *Chicago, etc., Railway Co. v. Wellman, supra* (p. 345):

> "A single suggestion in this direction: It is agreed that the defendant's operating expenses for 1888 were $2,404,516.54. Of what do these operating expenses consist? Are they made up partially of extravagant salaries—fifty to one hundred thousand dollars to the president and in like proportion to subordinate officers? Surely, before the Courts are called upon to adjudge an act of the Legislature fixing the maximum passenger rates for railroad companies to be unconstitutional on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for, if so advised, it might clearly appear that a prudent and honest management would, with the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the Court, it has not come to this: that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call 'operating expenses.'"

And we may ask, has it come to this, that a railway corporation earning nearly two millions of dollars annually from its operations in North Carolina alone be permitted to transfer from the purposes of local business one of its trains to through service, and to the end that its own revenues may be increased, at the sacrifice of the convenience of the people living along its line of railway, and, when called upon to comply with a reasonable order designed to promote the convenience of its own patrons, answer, "If we are to expend fifteen dollars per day to thus serve the people our property will be taken without due process of law and there will not be left of our two million dollars of annual net receipts earned from our business in North Carolina a sufficient 'compensation' to pay 'fixed charges' and any dividend, however small"?

The record shows (p. 153) that the net revenue of the plaintiff in error from its operations in North Carolina for the year 1903 amounted to $1,943,116.63. And yet the plaintiff in error alleges that if a loss of the comparatively trifling sum of fifteen dollars per day, or $5,475 annually, were sustained by reason of being forced to make the Selma connection, it would be taking property without due process of law and without compensation. It would only be a small and insignificant reduction of the enormous profits made by the plaintiff in error from its North Carolina business and by which it has been enabled to recently declare a dividend upon all of its stock, both common and preferred, of five per cent., after paying operating expenses and interest on alleged indebtedness, and yet have to its credit a clean-cut surplus of net earnings for the year 1903 of between three and four hundred thousand dollars.

It is respectfully submitted that the judgment of the Supreme Court of North Carolina should be affirmed.

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